



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

August 7, 2003

Mr. Frank Stenger-Castro
General Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2003-5526

Dear Mr. Stenger-Castro:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 185510.

The San Antonio Water System ("SAWS") received a request to review information relating to the purchase of the Medio Creek Wastewater Treatment Plant. Specifically, the requestor seeks access to "any and all service contracts as indicated on Schedule 1.5 of the Asset Purchase Agreement between Lackland City Water Company and [t]he City of San Antonio [the "City"], Texas entered into as of the 3rd day of October 1991." You inform us that SAWS possesses numerous responsive documents. You assert a small portion of the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We reviewed the information you submitted and considered the exceptions you claim.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*,

990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You inform us that Exhibit 1 contains an internal memorandum prepared by a named individual in her capacity as an attorney for the City.¹ You explain the memorandum consists of legal advice concerning the proposed acquisition of a wastewater treatment plant. Further, you advise us that this memorandum was distributed to a limited number of City staff. Based on your representations and our review of Exhibit 1, we conclude the memorandum constitutes a confidential communication made for the purpose of facilitating the rendition of professional legal services to the City. Accordingly, SAWS may withhold Exhibit 1 under section 552.107(1) of the Government Code.

You also claim the attorney-client privilege protects the contents of Exhibit 2. You state that “Exhibit 2 is part of a file of meeting notes and notes prepared by the lawyer and lawyer’s representatives, along with some drafts of advice given by the lawyer.” Based on your representations and our review of the information at issue, we conclude the draft in Exhibit 2 constitutes a confidential communication made for the purpose of facilitating the rendition of professional legal services to the City. However, we find SAWS has not sufficiently established the remainder of the information in Exhibit 2 constitutes or documents a communication. Accordingly, SAWS may withhold only the information we have marked in Exhibit 2 under section 552.107(1) of the Government Code.

¹ We note your footnote in which you explain the City created by ordinance a combined agency, SAWS, to handle water services for the City in 1992.

Last, we note that you claim section 552.111 of the Government Code; yet, you have not submitted written comments stating why this exception applies to the information at issue. *See* Gov't Code § 552.301(e)(1)(A). Thus, we have no basis to conclude that the remaining information at issue in Exhibit 2 warrants protection from required public disclosure under section 552.111.

In summary, SAWS may withhold all of Exhibit 1 and the portion of Exhibit 2 we have marked under section 552.107(1) of the Government Code. SAWS must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

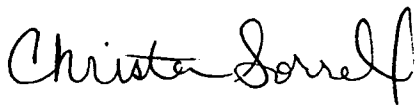
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Christen Sorrell". The signature is fluid and cursive, with the first name "Christen" and last name "Sorrell" clearly distinguishable.

Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/sdk

Ref: ID# 185510

Enc: Submitted documents

c: Mr. David Earl
Earl & Brown, P.C.
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(w/o enclosures)